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February 26, 2010

Via Electronic Filing

Hon.: Wexler, USDJ
United States District Court, EDNY
100 Federal Plaza
Central Islip, NY 11722-5730

Re: Lexico Enterprises v. Cumberland Farms, Inc.
Index no.: 2:08-CV-02221-LDW-WDW

Dear Judge Wexler:

This office represents plaintiff Lexico Enterprises, Inc. ("Lexico") in the above suit. I am writing to request that plaintiff be permitted to amend the previously filed pre-trial order to include an additional cause of action, or plaintiff be permitted to move to seek such relief.

This matter is ready for trial and is scheduled to be tried on July 20, 2010.

Plaintiff commenced another suit (2:09 CV 01712 ADS-TEB) against defendant Cumberland Farms, Inc. ("CFI") alleging that as a result of either CFI's wrongful refusal to consent to an assignment of a lease or CFI's tortious interference with a business opportunity, plaintiff sustained damages consisting of business losses due to plaintiff's having "to carry" the business for a year. Defendant moved to dismiss that suit on the grounds that the action is identical to the suit before your honor. Defendant's motion to dismiss is presently pending. By letter dated February 26, 2010, this office requested Magistrate-Judge Boyle to refrain from issuing a decision pending your Honor's ruling on this application.

In the other suit plaintiff's president was deposed on February 25, 2010. As a result of that deposition CFI's counsel is considering whether to depose plaintiff's accountant. Plaintiff has not served defendant with any discovery requests in the case before Judge Spatt.

Obviously it would serve judicial economy if plaintiff was granted permission to amend the previously filed pre-trial order. The additional cause of action would result in

plaintiff adding one additional witness to its witness list. I believe that it will take no more than one-half of a trial day to try the additional cause of action. Adding the additional cause of action will not delay the trial which is 5 months away.

This request was not made earlier, since at the time of CFI's motion, the time to amend the pleadings as of right had past and the date for submitting the pre-trial order was eminent. There was, therefore a distinct possibility that any application to consolidate would have been denied since it was coming shortly before the pre-trial order was due.

I have not discussed this request with CFI's counsel since on other occasions wherein this office sought short extensions, although CFI's counsel expressed amenability, CFI would not consent.

Respectfully submitted,
Kenneth Geller, PC

S/
By: Kenneth Geller (2399)

cc: via e-mail
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